BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the matter of	
Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc and for Arbitration	WC Docket No 02-359

PETITION FOR RECONSIDERATION

1. INTRODUCTION AND SUMMARY.

Cavalier Telephone LLC ("Cavalier"), pursuant to Section 1.108 of the Commission's rules, 47 C F R. § 1 106, respectfully seeks reconsideration of the *Memorandum Opinion and Order* issued in this matter on December 12, 2003 [1] Cavalier appreciates the extensive time and effort that the Bureau invested in its handling of this matter when the Virginia State Corporation Commission declined to do so. Nonetheless, Cavalier requests that the Bureau reconsider four separate aspects of the *MO&O* [2]

Issue C9 This issue relates to the terms and conditions applicable to Verizon's provision of unbundled loops Cavalier was concerned that Verizon was failing to provide true 4-wire loops in certain cases, and was instead substituting 2-wire loops with a 4-wire interface. The

---

[1] Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc and for Arbitration, WC Docket No 02-359, *Memorandum Opinion and Order* (released December 12, 2003) ("*MO&O*").

[2] The fact that Cavalier is limiting this Petition for reconsideration to these five issues does not mean that these are the only issues as to which Cavalier disagrees with the Bureau's conclusions These, however, are the key issues where Cavalier both disagrees with the Bureau and believes that the standard for seeking reconsideration under 47 C F R § 1 106 has been met

Bureau denied Cavalier's request that 4-wire loops be provided upon request based on the view that Verizon would provide Cavalier with 2-wire loops with a 4-wire interface under the same circumstances that Verizon would provide its own customers with this inferior arrangement. In fact, however, while Verizon will indeed attempt to provide its customers with 2-wire loops in some cases, it is Verizon's practice to provide a 4-wire loop upon customer request. Consequently, applying the Bureau's own logic — that Cavalier is entitled to what Verizon provides its retail customers — the Bureau should have ordered Verizon to provide Cavalier with true 4-wire loops on request.

Issue C21/V34. This issue relates to assurance of payment for services rendered under the contract. Cavalier had opposed any provision in the contract permitting either party to demand assurances of payment. However, the Bureau, relying largely on the Commission's *Deposit Policy Statement*, included language regarding this issue. Unfortunately, that language only addresses the conditions under which ***Verizon*** may demand assurances of payment from ***Cavalier.*** Cavalier submits that if this provision is to be included at all, then in fairness it should be mutual. Verizon's size and current market position is not assurance that it will not find itself in financial difficulties during the term of the contract. Moreover, Verizon has shown a willingness in the past to abuse its market position by simply refusing to pay amounts due to Cavalier. Cavalier should be as entitled as Verizon to demand reasonable assurance of payment, including deposits in accordance with the *Deposit Policy Statement*, if for whatever reason Verizon fails to pay its bills on time.

Issue C25. This issue relates to limitations of liability. Cavalier requested language that would make clear that the contractual limitation of liability would not bar recovery of damages occasioned by Verizon conduct that violates the Communications Act. The Bureau rejected that

language Cavalier submits that this conclusion is directly contrary to the language and purpose of the Act, and to recent Commission precedent Specifically, Sections 206 through 208 of the Act entitle anyone damaged by a carrier's violation of the Act to recovery of the amount of those damages The Commission, in its *CoreComm* cases, has held (correctly, given the text of the law) that Section 208 liability can and does arise in connection with at least some violations by incumbent carriers of their obligations under Section 251(c) of the Act, as embodied in the terms of interconnection agreements There is no obvious way to square the fact that the Act and Commission precedent expressly ***provide for*** carrier liability for violations of Section 251(c) and associated contractual terms with a ruling that a contract purportedly entered into to ***comply with*** Section 251(c) must or should limit liability for such violations. The Bureau, therefore, should reconsider this ruling and include "claims of violation of the Communications Act" within the set of matters excluded from the contractual limitation of liability

Issue C27 This issue relates to charges from Cavalier to Verizon for Cavalier truck rolls occasioned by Verizon provisioning errors The *MO&O* acknowledges that such problems occur, and have occurred in the past at an unduly high rate, but suggests that the problem can be minimized by means of cooperative prescreening of loop qualification. Cavalier accepts that cooperative prescreening can limit the problem, but that is not a valid reason for saddling Cavalier with the costs of Verizon-caused truck rolls in those situations (hopefully, fewer that previously) in which the problem nonetheless occurs The fact that Verizon flatly misrepresented its own handling of this issue in its representation to the Bureau is a further reason for granting reconsideration on this point.

2. VERIZON SHOULD BE REQUIRED TO PROVIDE CAVALIER WITH TRUE 4-WIRE LOOPS UPON REQUEST, JUST AS VERIZON DOES FOR ITS OWN CUSTOMERS.

Cavalier orders unbundled DS1 loops from Verizon to provide T-1 services to its customers. The 2-wire loops typically provided by Verizon for this purpose do not always do the job, so Cavalier has asked Verizon to provide the circuit over 4-wire loops. Verizon has denied such requests, and instead offers to provide 2-wire loops with a 4-wire interface. While sometimes this arrangement is sufficient to "make do," it is technically inferior to a true 4-wire loop for purposes of T-1 service. For this reason, Cavalier requested contract language that would have required Verizon to provide 4-wire loops upon Cavalier's request.[3]

The Bureau rejected this request. *See MO&O* at ¶¶ 96-99. The Bureau apparently concluded that since Verizon does not in all cases provide its own customers with a 4-wire loop, as compared to a 2-wire loops with a 4-wire interface, Verizon should not be required to do so for Cavalier. *See id.* at ¶ 98.

Accepting for purposes of this Petition that the correct standard to resolve this issue is comparability between Verizon's treatment of Cavalier and its treatment of its retail customers, reconsideration is appropriate because the Bureau misapplied that standard to the actual record evidence. That evidence showed that even though Verizon may not in every case present its own retail customers with 4-wire loops, it will, in fact, provide such a loop when a customer specifically requests one. *See* Rebuttal Testimony of Amy Webb on Behalf of Cavalier Telephone, LLC at 1-2. As Ms. Webb stated: "Cavalier . . . wants to be able to order 4-wire DS-1

---

[3] This is not to say that Cavalier would inevitably request a 4-wire loop when none was available without further work by Verizon. But if Cavalier believes that its proposed service to its customer truly requires a 4-wire loop, it would indeed request that Verizon deploy one.

compatible loops. ***Verizon will not honor such orders from Cavalier, even though it will honor such orders from its customers.***" *Id* at page 1, lines 14-17 (emphasis added).

In other words, the evidence shows that in demanding the right to obtain 4-wire loops when it specifically orders them, Cavalier is ***not*** trying to receive treatment that is more favorable than what is provided to Verizon's retail customers; the *MO&O* is simply mistaken on this point.[4] Instead, the evidence shows that requiring Verizon to honor Cavalier's orders for a true 4-wire loop is precisely what is required in order to provide parity between what Verizon provides to Cavalier and what Verizon provides to its own retail customers. Applying the very same standard articulated by the Bureau, therefore, Cavalier should win, not lose, on this issue. Reconsideration on this point, therefore, is appropriate.

3. THE RIGHT TO DEMAND REASONABLE ASSURANCES OF PAYMENT SHOULD BE MUTUAL.

Verizon sought to include language in the contract laying out when it may demand assurances of payment, advance deposits of amounts expected to become due, etc. Cavalier opposed any such requirement, on the grounds that it was unnecessary and that any such power on Verizon's part was subject to significant abuse. *See MO&O* at ¶¶ 159-66. The Bureau agreed with Cavalier that in many respects Verizon's specific proposed language was unreasonable and potentially oppressive, but agreed with Verizon that some provision dealing with this issue, consistent with the Commission's *Deposit Policy Statement,* was appropriate. *Id* at ¶¶ 167-73.

Cavalier is not here seeking reconsideration of the Bureau's decision to impose a provision regarding assurance of payment consistent with the *Deposit Policy Statement*. Given that the Bureau decided to impose such a provision, however, Cavalier strongly objects to the

---

[4] Significantly, the *MO&O's* discussion of this issue makes no reference to the rebuttal testimony cited above. The Bureau appears to have overlooked this evidence in its determination in the *MO&O*.

notion that its benefits run entirely to Verizon and its burdens run entirely to Cavalier. Instead, the actual provision should be mutual, permitting ***either*** party to demand reasonable assurances of payment if the other party has a "proven history of late payment," as defined in the *MO&O's* discussion of this issue

It is easy to assume that Verizon's apparent financial strength means that Verizon simply does not pose a significant risk of late payment or non-payment. This is at least potentially false for two important reasons. First, even if Verizon has the wherewithal to pay its bills to Cavalier, it may be inclined to (indeed, it ***has*** been inclined to) put financial pressure on Cavalier by simply refusing to pay certain bills and using that refusal as leverage against Cavalier in other arenas Cavalier should be contractually empowered to respond to such tactics by demanding deposits and — if they are not forthcoming — cutting off Verizon's access to Cavalier in the same manner and to the same extent that Verizon has such rights against Cavalier in the opposite situation

Second, as Verizon is fond of pointing out when discussing the risks it faces with even large CLEC's (its standard example is WorldCom), the fact that an entity is large, established, and has a seemingly reputable accounting firm vouching for its financial statements is not, in today's world, truly adequate assurance that the firm really, truly is and will remain financially sound. Indeed, some analysts believe that current ILEC business models are rapidly becoming unsustainable.[3]

Furthermore, if it turns out that Verizon is and remains completely financially sound and *that Verizon resists all* temptation to abuse its monopoly position by short-paying (or not paying)

---

[3] *See, e.g.*, comments of Roxanne Googin in D Isenberg's "Smart Letter" #64, available at http://www.isen.com/archives/011216.html

its bills to Cavalier, then a mutual "assurance of payment" provision would simply never be invoked against Verizon In other words, while the benefit to Cavalier of being able to protect itself against failures to pay by Verizon are clear (and completely reasonable), the harm to Verizon of making this provision mutual is simply non-existent.

In these circumstances, Cavalier submits that reconsideration of the Bureau's specific proposed language on this point in the *MO&O* (at ¶ 173) to make that language mutual, is appropriate

4. LIABILITY FOR VIOLATIONS OF THE COMMUNICATIONS ACT SHOULD BE EXCLUDED FROM THE GENERAL CONTRACTUAL LIMITATION OF LIABILITY.

Cavalier and Verizon agree that the contract should contain a provision limiting liability for breaches of contract in some, but not all, situations. They disagreed, however, on what types of situations should be exempt from the limitation of liability

Verizon ultimately acceded to language providing that the limitation of liability did ***not*** apply, among other things, to claims that a party violated the antitrust laws. However, this concession was hollow if Verizon continues to prevail in its argument that Cavalier has no claim for violation of the antitrust laws because Verizon's only "pro-competitive" obligations flow from the Communications Act [6] Consistent with this position, Verizon has continued to maintain that the limitation of liability should apply to liability for violations of state and federal communications laws The Bureau agreed with Verizon *MO&O* at ¶¶180-84

Cavalier seeks limited reconsideration on this issue and requests that on reconsideration the Bureau require that claims for violations of the Communications Act, like claims for

---

[6] *Cavalier Telephone, LLC v Verizon Virginia Inc* , 208 F Supp 2d 608 (E D Va 2002), *aff'd, Cavalier Telephone, LLC v Verizon Virginia Inc* , 330 F 3d 176 (4th Cir 2003).

violations of the antitrust laws, be excluded from the contract's limitation of liability. Indeed, Cavalier submits that this is the only result that is consistent with the requirements of the Act

Sections 206-08 of the Act provide in unequivocal terms that a carrier that violates the provisions of the Act is liable in damages to the party harmed. *See* 47 U.S.C. §§ 206-08. In its recent *CoreComm* cases, the Commission confirmed that violations of a carrier's duties under Sections 251 and 252 give rise to damages liability under Section 206. Essentially, the Commission found that when an incumbent violates at least some types of provisions in an interconnection agreement, it constitutes unreasonable behavior by a carrier and therefore violates Section 201 of the Act *Core Communications v SBC*, 18 FCC Rcd 7568 (2003). At ¶ 14 of that order (footnotes omitted), the Commission stated:

> The language of the [Act] expressly grants the Commission jurisdiction to resolve complaints alleging any violation of the Act Section 206 makes carriers liable for damages for "any act, matter, or thing in this Act prohibited or declared to be unlawful" and for "omit[ting] to do any act, matter, or thing in this Act required to be done." Similarly, section 208 allows a complaint to be filed by "[a]ny person complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof... ." Thus, the Commission's complaint jurisdiction has generally been understood to be coextensive with the reach of the substantive provisions at issue.

The Commission expressly held that since Section 206 establishes liability for any violations of the "Act," that section applied to violations of Sections 251 and 252. *Id* at ¶¶ 15-16.

In a decision issued the same day, the Commission also found that violations of the terms of an interconnection agreement relating to interconnection, and/or the provision of unbundled network elements, also violated the Act In *Core Communications v Verizon-Maryland*, 18 FCC Rcd 796 (2003), the Commission found that Section 251(c)(2)(D) of the Act expressly requires incumbents to provide interconnection in accordance with the terms of interconnection agreements, in effect "federalizing" those contract obligations *See CoreComm v Verizon* at ¶ 25

With due respect, the Bureau's reliance on the *Virginia Arbitration Order* on this point, *see MO&O* at ¶¶ 182-83, cannot survive the subsequent legal analysis provided by the Commission in the two *CoreComm* cases. The local competition provisions of the Communications Act are an integrated part of Title II, so the normal damages remedies of Title II provided in Sections 206-208 apply to conduct governed by Sections 251 and 252. That was the only logical implication of the Supreme Court's decision in *AT&T Corp v Iowa Utilities Board* 525 U S 366 (1999), where the Court chose to base its affirmance of the Commission's authority to enact regulations to implement Sections 251 and 252 on 47 U.S.C. § 201(b) The Court relied on the simple logic that Section 201(b) stated that the Commission has the authority to promulgate rules to implement "the Act," meaning the entire Communications Act. Since Congress chose to incorporate Sections 251 and 252 into the Communications Act, it followed that Congress intended Section 201(b) to apply

The Commission understood and applied precisely this rationale in the *CoreComm v SBC* case *Id*, 18 FCC Rcd 7568 at ¶ 16 How can it possibly be deemed to be ***consistent*** with the requirements of the Act to ***deprive*** Cavalier of a damages remedy that the Act ***expressly grants*** to Cavalier, in cases where Verizon is indeed found to have violated the Act? The only sensible answer is that it cannot [7] Reconsideration of this point is, therefore, required

5. VERIZON SHOULD BE LIABLE TO CAVALIER FOR THE COSTS OF VERIZON-CAUSED CAVALIER TRUCK ROLLS.

The final issue on which Cavalier seeks reconsideration relates to Cavalier's right to charge Verizon for Cavalier truck rolls occasioned by Verizon provisioning errors in connection

[7] Note that excluding violations of the Communications Act from the limitation of liability clause has no bearing whatsoever on whether any particular Verizon conduct actually constitutes a violation of the Act. Those "on the merits" questions would need to be adjudicated on a case by case basis All that such an exclusion would do is -- as provided in the Act — give Cavalier a meaningful damages remedy in those situations where an appropriate forum indeed finds that substantive violation has occurred

with two-wire analog loops The *MO&O* acknowledges that such problems occur, and have occurred in the past at an unduly high rate. *See MO&O* at ¶ 195. The Bureau, however, concluded that the unreasonably high incidence of errors could be corrected, or at least significantly mitigated, by participating in Verizon's "Cooperative Testing program" for xDSL loops, to be transplanted from New York to Virginia *Id* Such a prophylactic approach is all well and good, as far as it goes To be sure, Cavalier hopes that its participation in such testing might indeed lower the incidence of Cavalier truck rolls caused by Verizon's provisioning problems

The fact remains, however, that Verizon's error rate in this regard will not be reduced to zero As a result, when errors of this sort occur, Cavalier will be called upon to deploy its personnel to try to sort out the mess Verizon did not claim that participation in the testing program would eliminate Verizon-caused Cavalier truck rolls; it only claimed, as the Bureau found, that participating in the program might "'***reduce*** [Cavalier's] truck rolls.'" *See MO&O* at ¶ 195 (quoting Verizon, emphasis added) Nothing in Verizon's claims, or in the Bureau's analysis of this issue, provides any basis for concluding that ***when those problems arise, Verizon should escape responsibility for the costs it imposes on Cavalier.*** In fact, no such basis exists Cavalier, more than anyone, sincerely hopes that participating in the testing program will improve Verizon's performance regarding the provisioning of xDSL loops. But when Verizon commits errors, Verizon, not Cavalier, should bear the financial consequences of those errors. This alone is a sufficient reason to reconsider the *MO&O* on this point.

Moreover, Verizon's credibility on this entire issue is, to put it mildly, subject to severe and justified question An issue arose at the hearing as to whether ***Verizon*** would back-bill retroactive truck-roll charges on ***Cavalier*** in situations where Cavalier errors caused Verizon to

dispatch personnel, Verizon piously asserted in its reply brief before the Bureau that no such back-billing would occur[8] Yet scarcely a month following the filing of that brief, Cavalier received a back-bill for approximately $170,000 for these kinds of charges *See* Letter from S Perkins to M Dortch dated December 11, 2003 (filed in WC Docket No. 02-359) Given the December 12, 2003 date on the *MO&O*, the Bureau was apparently not in a position to assess the impact of Verizon's misrepresentation on its analysis of the entire truck roll issue. Now, however, there is no reason to ignore this information, which provides an additional reason for granting reconsideration on this point - parity

[8] At pp 69-70 of its November 3, 2003 Reply Brief, Verizon stated that: "Cavalier again asserts that Verizon plans to charge Cavalier retroactively for three years of past truck rolls Staff asked at the hearing whether Verizon plans to bill these charges retroactively in Virginia The answer is no Two of the three charges discussed in the letter ("TC Not Ready" and "Expedite") are not charges that have been approved in Virginia and Verizon does not bill for them. Verizon has been accurately billing the third charge ("Dispatch") in Virginia, so there is no need to bill it retroactively "

7. CONCLUSION.

For the reasons stated above, Cavalier respectfully requests that the Bureau reconsider the *MO&O* in the four specific respects identified in this Petition.

Respectfully submitted,

CAVALIER TELEPHONE, LLC

By. _____

Christopher W. Savage
COLE, RAYWID & BRAVERMAN, L.L.P.
1919 Pennsylvania Ave , N.W., Suite 200
Washington, D.C. 20006
Tel. (202) 659-9750
Fax (202) 452-0067

Stephen T. Perkins
Richard U Stubbs
Cavalier Telephone, LLC
2134 West Laburnum Avenue
Richmond, Virginia 23227-4342
Tel. (804) 422-4517
Fax (804) 422-4599

Its Attorneys

January 12, 2003

CERTIFICATE OF SERVICE

I certify that true and accurate copies of the foregoing pleading were served on the following persons, by the methods indicated

by electronic mail and by first class U S mail.

Karen Zacharia
Kathleen M. Grillo
Verizon Virginia Inc.
1515 North Court House Road, 5th Floor
Arlington, VA 22201
e-mail karen zacharia@verizon com, kathleen m grillo@verizon.com,

James R Young
Kimberly A Newman
O'Melveny & Myers
1625 I Street, NW
Washington, DC 20006
e-mail jryoung@omm com,
knewman@omm.com , and

by electronic mail
Ms Terri Natoli (terri natoli@fcc gov),
Mr Jeremy Miller (jeremy miller@fcc gov); and
Ms Deena Shetler (deena shetler@fcc.gov).

Counsel